SUPREME COURT, U.S.
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No. 10-778

IN THE
Supreme Court of the United States

BINYAM MOHAMED, *ET AL.*,

Petitioners,

v.

JEPPESEN DATAPLAN, INC.; AND
UNITED STATES OF AMERICA

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT JEPPESEN DATAPLAN, INC.'S BRIEF IN OPPOSITION

DANIEL P. COLLINS
Counsel of Record
PAUL J. WATFORD
MUNGER, TOLLES & OLSON LLP
355 SO. GRAND AVE., 35TH FL.
LOS ANGELES, CA 90071
DANIEL.COLLINS@MTO.COM
TELEPHONE: (213) 683-9100
Counsel for Respondent Jeppesen DataPlan, Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether the Court of Appeals, in conformity with the decisions of all other circuit courts to address the question, correctly rejected Petitioners' proposed categorical rule that a case may *never* be dismissed at the pleadings stage based on the Government's assertion of the state secrets privilege.

2. Whether the Court of Appeals correctly determined that, in light of the specific facts and circumstances of this lawsuit, this was one of the "rare case[s] when the state secrets doctrine leads to dismissal at the outset of the case."

RULE 29.6 STATEMENT

Jeppesen DataPlan, Inc. is a wholly owned subsidiary of Jeppesen Sanderson, Inc., which in turn is a wholly owned subsidiary of The Boeing Company, a publicly traded company.

The following two companies have disclosed, in filings with the U.S. Securities and Exchange Commission, beneficial ownership of 10% or more of the outstanding stock of The Boeing Company as of December 31, 2010: (1) State Street Corporation, a publicly held company whose subsidiary State Street Bank and Trust Company acts as trustee of The Boeing Company Employee Savings Plans Master Trust and (2) Evercore Trust Company, N.A., which acts as investment manager of The Boeing Company Employee Savings Plans Master Trust and is a subsidiary of the publicly held Evercore Partners, Inc.

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INTRODUCTION

Petitioners seek review of an en banc Ninth Circuit decision that properly applied settled law in concluding that this lawsuit presents a "rare case when the state secrets doctrine leads to dismissal at the outset of a case." Pet. App. 72a. That decision does not conflict with any decision of this Court or of any other court of appeals. On the contrary, the Ninth Circuit here properly invoked its en banc procedure to overturn an aberrant panel decision and thereby *eliminate* what would have been a direct conflict with the Fourth Circuit. *See El-Masri v. United States*, 479 F.3d 296 (4th Cir.) (dismissing a comparable suit based on the state secrets privilege), *cert. denied*, 552 U.S. 947 (2007). The Petition should be denied.

Petitioners allege that they were mistreated by agents of the CIA, as well as agents of other governments, when they were purportedly transported from one foreign country to another as part of the CIA's alleged "extraordinary rendition" program. Rather than sue the United States or its agents, however, Petitioners brought suit against only a single defendant—Respondent Jeppesen DataPlan Inc. ("Jeppesen"). Jeppesen's only purported connection to the claimed abuse is the allegation that, from its San Jose, California office, Jeppesen remotely provided commercial flight planning services (such as procuring landing rights and filing flight plans) for the particular overseas flights on which Plaintiffs were allegedly transported. Despite the highly tenuous nature of Jeppesen's alleged connection, Petitioners insisted that Jeppesen could be held liable because it supposedly "entered into an agreement with" the CIA to assist in Petitioners' extraordinary rendi-

tion and because it acted in "reckless disregard" of the purpose of the flights it allegedly assisted. (Ct. of App. Excerpts of Record (ER) 819.) After the United States intervened and asserted the state secrets privilege over several categories of information—including "information that would tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with clandestine intelligence activities," Pet. App. 56a—the district court dismissed the action. *Id.* at 18a. The en banc court of appeals affirmed, holding that dismissal was warranted because it was already clear that "*any* plausible effort by Jeppesen to defend against [plaintiffs' claims] would create an unjustifiable risk of revealing state secrets." *Id.* at 61a-62a.

The en banc court's analysis does not present any split of authority. The Ninth Circuit correctly summarized the settled legal standards that have been applied by this Court and the courts of appeals in determining whether a case should be dismissed due to the state secrets privilege. The court below noted that, in addition to cases in which the invocation of the privilege precluded the plaintiff from establishing a *prima facie* case or deprived the defendant of a defense, the courts consistently have held that dismissal is warranted when "litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets." Pet. App. 49a (collecting cases). The court found that the particular circumstances of this case fell within this established rule. *Id.* at 59a-65a.

Petitioners urge that this settled law be rejected in favor of a novel categorical rule that bars pleading-stage dismissals based on the state secrets privilege, no matter how obvious it is that privileged evidence is

entwined with the information needed to defend against the case. Pet. 28-29. Unsurprisingly, no court has adopted Petitioners' proposed inflexible rule, which would improperly require the courts "'to play with fire and chance further disclosure.'" Pet. App. 44a. Moreover, Petitioners' novel *per se* rule would be completely impractical and grossly unfair to Jeppesen. Petitioners' proposal amounts to the view that this litigation should go forward as a one-sided farce in which Petitioners would get to present their side of the story, while Jeppesen would be stripped of *any* practical ability to contest Petitioners' claims. The court of appeals properly declined to endorse such an unworkable procedure, which would unfairly deprive Jeppesen of its due process right to defend itself.

Moreover, even if there were any merit to Plaintiffs' proposed rewrite of settled law governing the state secrets privilege, this case would be a poor vehicle for undertaking such a revision. As a consequence of Petitioners' decision to assert only claims, under the Alien Tort Statute, against a tangential private entity, this suit suffers from multiple collateral legal deficiencies that make it a poor candidate for Petitioner's wholesale reworking of established law.

STATEMENT

1. Petitioners are five foreign nationals who allege that the CIA unlawfully transported them from one foreign country to another pursuant to the CIA's alleged "'extraordinary rendition' program." (ER 753.) They allege that before or after these alleged flights, agents of the CIA and/or agents of foreign governments subjected them to severe mistreatment.

Pet. App. 26a-30a. By this action, Petitioners sought compensation for these injuries.

Petitioners, however, have not brought suit against the CIA, any foreign government, or any of their officers or agents. Instead, Petitioners have sued only Jeppesen, a private company that provides flight-planning services. Petitioners do *not* contend that Jeppesen itself engaged in any acts of mistreatment. Nor do Petitioners allege that Jeppesen even owned the relevant aircraft, operated the flights, or had any personnel on board. On the contrary, Petitioners allege that other "U.S.-based corporations ... owned and operated" the aircraft. (ER 814.) In particular, the lengthy narrative of Plaintiffs' alleged mistreatment, which comprises the bulk of their operative complaint, contains no allegations whatsoever that Jeppesen or its employees directly or personally participated in that alleged abuse. (ER 761-818.)

Indeed, Jeppesen is mentioned in only 19 of the 222 paragraphs of the "Factual Allegations" section of the complaint, and of those 19 paragraphs, 13 allege *only* that Jeppesen provided commercial flight-planning services for the particular flights in question—services such as filing flight plans, obtaining landing rights, and arranging for third parties in the relevant foreign countries to provide fuel and ground services. (ER 766-70, 772-73, 814-17.) Three of the remaining paragraphs emphasize the logistical importance of flight-planning services to accomplishing such flights, asserting that the CIA's alleged use of a conventional flight-services company allowed its activities to evade

public scrutiny. (ER 767-68, 813.)[1] The final three paragraphs allege in conclusory terms that Jeppesen "entered into an agreement with agents of the CIA and U.S.-based corporations" to provide such flight planning services (ER 814), and that Jeppesen "knew or reasonably should have known" the purpose of the flights (ER 770, 817-18).

The allegation that Jeppesen "knew or reasonably should have known" that its flight-planning services were supporting the rendition of Petitioners—an allegation that is reproduced in conclusory terms elsewhere in the complaint (ER 757, 818-19, 821-22)—is supported only by (1) allegations of the generally poor human rights records of the destination countries for which flight plans were filed (ER 763-66); (2) conclusory allegations of a secret agreement between Jeppesen and "agents of the United States to unlawfully render Plaintiffs to secret detention" (ER

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[1] Citing a Council of Europe Report, Petitioners also contend that, for certain alleged rendition flights, the CIA did not always adhere to the flight plans that were filed, resulting in "dummy flight[]" plans that Petitioners assert Jeppesen "intentionally" filed. (ER 757-58; *see also* ER 767.) However, the limited number of flights that the Report cites as illustrating this practice all involve alleged diversion of flights to Poland, where Polish officials allegedly handled the diverted flight-planning until the aircraft departed Poland to complete the remaining elements of the Jeppesen-filed flight plan. *See* D. Marty, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report* 37-38 (June 7, 2007). Petitioners do not allege that they were ever transported to or through Poland. Moreover, other than cross-referencing the initial complaint in this very case and other allegations reproduced within it, the Report does not set forth any facts suggesting that Jeppesen intentionally falsified flight plans. *Id.*

819; *see also* ER 814, 821); and (3) allegations that, in the summer of 2006—*i.e.*, long after the flights in question had occurred and after the publication of numerous press accounts of the U.S.'s "extraordinary rendition" program—a Jeppesen employee allegedly acknowledged that the company did "extraordinary rendition flights" (ER 757; *see also* ER 19-20).

Based on these allegations, Petitioners asserted two causes of action under the Alien Tort Statute, 28 U.S.C. § 1350, asserting that Jeppesen should be held liable for Petitioners' alleged unlawful detention and torture by the CIA and various foreign governments. (ER 818-22.)

2. Before Jeppesen could respond to the complaint, the United States moved to intervene in the district court and formally asserted the state secrets privilege. The assertion of the privilege covered at least four specific categories of information, including "[i]nformation that may tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with any alleged clandestine intelligence activities, including the CIA terrorist detention and interrogation program." (ER 746.)

The United States moved to dismiss the action in light of its assertion of the state secrets privilege. The district court granted the motion, holding that the "very subject matter" of Petitioners' action involved a state secret—namely, alleged "covert U.S. military or CIA operations in foreign countries against foreign nationals." Pet. App. 18a. Based on a review of the public and classified declarations submitted by the Government, the district court concluded that "proceeding with this case would jeopardize national security and foreign relations and

that no protective procedure can salvage this case." *Id.* at 16a-17a.

3. A three-judge panel of the Ninth Circuit reversed. 579 F.3d 943 (9th Cir. 2009). The panel held that dismissal at the outset is justified only when the subject matter of the action is "a secret agreement between a *plaintiff* and the government"—*i.e.*, the specific factual setting at issue in *Totten v. United States*, 92 U.S. 105 (1876), where this Court dismissed an action brought by the estate of a former Union spy seeking to enforce an alleged agreement to obtain military intelligence during the Civil War. 579 F.3d at 952 (emphasis added); *see also id.* at 953-56. The panel then held that, beyond this limited circumstance governed by *Totten*, the state secrets privilege may never be invoked as a basis for dismissing an action at the pleading stage. Purporting to follow this Court's decision in *United States v. Reynolds*, 345 U.S. 1 (1953), the panel declared that the state secrets privilege is merely an evidentiary privilege that protects specific items of evidence, and thus may be invoked only during discovery or at trial in response to a particular evidentiary request. 579 F.3d at 956-58. The panel remanded the case to allow the district court to conduct an item-by-item evaluation of any evidence over which the privilege was subsequently asserted as the case progressed. *Id.* at 962.

4. Both the United States and Jeppesen petitioned for rehearing en banc. The Ninth Circuit granted the petitions and affirmed the district court's dismissal of the action by a 6-to-5 vote. Pet. App. 21a-93a.

The en banc court began its analysis by distinguishing between the "*Totten* bar," which "completely

bars adjudication of claims premised on state secrets," and the "*Reynolds* privilege," which "excludes privileged evidence from the case and *may* result in dismissal of the claims." Pet. App. 35a. With respect to the *Totten* bar, the court rejected Petitioners' (and the three-judge panel's) contention that the bar applies only to "claims premised on a plaintiff's espionage relationship with the government." *Id.* at 37a-38a. The court noted that, while *Totten* itself involved such claims, the general principle announced in that case "extends beyond that specific context," and encompasses any case in which "'the very subject matter of the action' is 'a matter of state secret.'" *Id.* at 38a (quoting *Reynolds*, 345 U.S. at 11 n.26).

With respect to the *Reynolds* privilege, the court noted that, unlike the *Totten* bar, a valid invocation of the privilege "does not automatically require dismissal of the case." Pet. App. 40a. But in some instances, the court held, application of the privilege will require dismissal. Comprehensively reviewing the case law on this subject, the court identified three circumstances in which the privilege may require dismissal of an action. First, when "'the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence'"; second, when the defendant is deprived of "'information that would otherwise give the defendant a valid defense to the claim'"; and third, when privileged evidence is "inseparable from nonprivileged information that will be necessary to the claims or defenses," such that "litigating the case to a judgment on the merits would present an unacceptable risk of disclosing state secrets." *Id.* at 48a-49a.

The Ninth Circuit held that this case fell within the third of these categories. The court reached this con-

clusion after "carefully and skeptically review[ing] the government's classified submissions," which included "supplemental information not presented to the district court." Pet. App. 58a-59a. The court's review confirmed that, even if Petitioners' claims and Jeppesen's defenses did not inevitably depend on privileged evidence, "there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets." *Id.* at 60a (emphasis omitted).

Given the sensitive nature of the information contained in the Government's classified submissions, the court stated that it was "necessarily precluded from explaining precisely why this case cannot be litigated without risking disclosure of state secrets, or the nature of the harm to national security that we are convinced would result from further litigation." Pet. App. 65a. But the court held that, "[w]hether or not Jeppesen provided logistical support in connection with the extraordinary rendition and interrogation programs, there is precious little Jeppesen could say about its relevant conduct and knowledge without revealing information about how the United States government does *or does not* conduct covert operations." *Id.* at 63a. The court noted that this case was "exceptional," because "the relevant secrets are difficult or impossible to isolate and even efforts to define a boundary between privileged and unprivileged evidence would risk disclosure by implication." *Id.*; *see also id.* at 64a ("our detailed *Reynolds* analysis reveals that the claims and possible defenses are so infused with state secrets that the risk of disclosing them is both apparent and inevitable").

In light of its conclusion that the *Reynolds* privilege required dismissal of the case, the court declined to

reach the further question of whether the *Totten* bar was applicable on the ground that the very subject matter of this action is a state secret. Pet. App. 54a.

The five dissenting judges included all three members of the original three-judge panel. Judge Hawkins, who authored the three-judge panel opinion, also authored the en banc dissent, in which he largely reiterated the views expressed in that earlier opinion. *See supra* at 7. In particular, Judge Hawkins adhered to the view that the *Reynolds* privilege can never be asserted at the pleading stage, but instead "must be invoked *during discovery* or *at trial*" in response to requests for specific items of evidence. Pet. App. 84a.

REASONS FOR DENYING THE PETITION

I. No Conflict Exists in the Lower Courts Over the Scope and Application of the *Reynolds* Privilege

Petitioners urge review on the ground that application of the *Reynolds* privilege has supposedly resulted in "conflicting decisions" and "widespread confusion" in the lower courts over the circumstances in which a case may be dismissed on the basis of the privilege. Pet. 24. No such conflict or confusion exists.

On the contrary, the en banc court of appeals in this case *eliminated* what would otherwise have been a direct circuit split between the three-judge panel decision and the Fourth Circuit's decision in *El-Masri v. United States*, 479 F.3d 296 (4th Cir.), *cert. denied*, 552 U.S. 947 (2007), which affirmed the dismissal of a similar lawsuit brought by the same counsel against private airline companies that allegedly assisted in extraordinary rendition flights. The en banc Ninth

Circuit exhaustively reviewed the relevant case law on the state secrets privilege and, adhering to that settled law, the court correctly agreed with *El-Masri* that the unusual circumstances presented here fell within a narrow but well-settled category of cases in which continued litigation would "risk disclosure by implication" of state secrets. Pet. App. 63a.

By contrast, the three-judge panel opinion that was correctly rejected by the en banc court would have dramatically rewritten established law governing the state secrets privilege by adopting Petitioners' unprecedented suggestion that the privilege can *never* justify dismissal at the pleadings stage, no matter how great the risk that further litigation will reveal state secrets. 579 F.3d at 957-58. According to the three-judge panel (and Petitioners), *see id.* at 957; Pet. 24-29, the only circumstance in which a complaint implicating state secrets may be dismissed at the pleadings stage is when the complaint happens to fall within the distinct but related doctrine categorically prohibiting suits "that depend upon clandestine spy relationships." *Tenet v. Doe*, 544 U.S. 1, 10 (2005) (expressly distinguishing this rule from the state secrets privilege); *see also Totten v. United States*, 92 U.S. 105 (1876). By rejecting the panel's novel and erroneous approach, and instead bringing the Ninth Circuit back in line with the settled legal principles that have long been applied by the other circuits, the en banc court here fulfilled precisely the purpose for which the en banc mechanism exists. *See* Fed. R. App. P. 35(b)(1)(B) (en banc review is warranted when "the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue"); *cf. United States v. Shabani*, 513 U.S. 10, 12 (1994) (reversing aberrant Ninth Circuit panel decision and expressing

puzzlement that "[f]or reasons unknown, the Court of Appeals did not grant en banc review").

1. As the en banc court below correctly explained, *see* Pet. App. 47a-50a, the courts of appeals (including the Ninth Circuit) have uniformly held that application of the *Reynolds* privilege can require dismissal of an action in limited circumstances. *See, e.g.*, *Sterling v. Tenet*, 416 F.3d 338, 347-48 (4th Cir. 2005); *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004); *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998); *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141-44 (5th Cir. 1992); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991). The Ninth Circuit's en banc opinion properly and thoroughly reviewed this case law in articulating the three sets of circumstances in which dismissal based on the state secrets privilege may be justified: (1) when the plaintiff cannot prove a *prima facie* case with nonprivileged evidence; (2) when the privilege deprives a defendant of its ability to defend the action; and (3) when continued litigation "would present an unacceptable risk of disclosing state secrets." Pet. App. 48a-49a; *see also In re Sealed Case*, 494 F.3d 139, 153 (D.C. Cir. 2007) (explicitly recognizing the same three categories of cases that might be subject to dismissal in light of the state secrets privilege).

Petitioners attack the en banc court's third category and the entire notion of pleadings-stage dismissals. They contend that dismissal based on the state-secrets privilege "is appropriate solely when the removal of privileged evidence renders it impossible for the plaintiff to put forth a *prima facie* case, or for the defendant to assert a valid defense—a determination

that *cannot* be made at the pleading stage." Pet. 28-29 (emphasis added).

Petitioners, however, fail to identify a single decision that adopts any such categorical rule against pleadings-stage dismissals, and the decided cases that directly address the point are all to the contrary. In addition to the Ninth Circuit's en banc decision in this case, numerous courts have upheld dismissal of an action at the pleading stage when it was clear that continued litigation of the case would inevitably risk disclosure of privileged information. *See, e.g.*, *El-Masri*, 479 F.3d at 308-13; *Sterling*, 416 F.3d at 347-48; *Black*, 62 F.3d at 1119; *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam); *see also Bareford*, 973 F.2d at 1141-44 (invoking Fed. R. Civ. P. 56 to affirm dismissal of complaint before discovery); *Zuckerbraun*, 935 F.2d at 546-48 (same). Indeed, as noted, the Fourth Circuit upheld dismissal of a very similar action brought by the same plaintiffs' counsel against airline companies and a former CIA Director. *El-Masri*, 479 F.3d at 308-13. There is uniformity and consistency in the circuits, not a split.

2. Petitioners nonetheless note that some courts have "refused to dismiss suits at the pleading stage." Pet. 26. But these cases are of no assistance to Petitioners, because none of them adopted Petitioners' proposed categorical rule forbidding pleading-stage dismissals on the basis of the state secrets privilege. Rather, each of them merely involved a factbound determination that, given the nature of the privileged information at issue and its connection to the claims or defenses raised, the standard for dismissal had not been met.

In *In re United States*, 872 F.2d 472 (D.C. Cir. 1989), for example, the court expressly acknowledged that dismissal on the pleadings *is* sometimes appropriate. *Id.* at 476. But after reviewing the Government's classified submission, both the district court and the court of appeals "remain[ed] unpersuaded" that the nation's security and diplomatic interests would be harmed "were this case to continue through the normal course of litigation." *Id.* at 479. Both courts agreed that "with evidentiary control the litigation could proceed without jeopardizing national security." *Id.* at 478. On the very different facts involved here, however, the district court and en banc court of appeals determined that this case could *not* proceed without jeopardizing the nation's security and foreign relations, and that "no protective procedure can salvage this case." Pet. App. 16a-17a; *see id.* at 60a ("there is no feasible way to litigate Jeppesen's alleged liability without creating an unjustifiable risk of divulging state secrets").

None of the remaining decisions cited by Petitioners establishes any categorical rule forbidding pleading-stage dismissals. Neither *DTM Research, L.L.C. v. AT&T Corp.*, 245 F.3d 327 (4th Cir. 2001), nor *Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356 (Fed. Cir. 2001), had any occasion to address the issue of when pleading-stage dismissals are appropriate; both cases instead involved summary judgment rulings. Even in that context, the courts merely issued factbound rulings determining that, given the limited relevance of any privileged information to the claims and defenses at issue, the cases could safely proceed "without risking disclosure of any materials which have been ruled out-of-bounds." *DTM*, 245 F.3d at 335 (internal quotation marks omitted); *see Monarch*, 244 F.3d at 1364-65.

Likewise, the two district court cases Petitioners cite merely made factbound determinations that dismissal was unwarranted on the facts of those cases. *See Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 994 (N.D. Cal. 2006) ("Because of the public disclosures by the government and AT&T, the court cannot conclude that merely maintaining this action creates a 'reasonable danger' of harming national security."), *remanded*, 539 F.3d 1158 (9th Cir. 2008); *Spock v. United States*, 464 F. Supp. 510, 519-20 (S.D.N.Y. 1978). These decisions do not reveal a material disagreement over the applicable standards governing dismissals based on the state secrets privilege; instead, they simply reflect the factbound application of settled standards to widely different records.

In short, the decision below is fully consistent with the decisions from other circuits applying the *Reynolds* privilege. There is no "conflict" concerning the scope and application of the privilege for the Court to resolve or any "confusion" for the Court to clear up. What Petitioners actually challenge here is simply the en banc Ninth Circuit's application of the settled standards for pleading-stage dismissals to the particular facts of this case. As the Ninth Circuit emphasized, only in "rare circumstances" will pleading-stage dismissals be warranted. Pet. App. 63a. The court correctly held that this case does involve such circumstances, and the court explained—to the extent it was able, given the highly sensitive nature of the privileged information involved—why this case qualifies as "exceptional." *Id.* That determination turns

entirely on the unique facts of this case and does not warrant this Court's review.[2]

II. The Ninth Circuit Correctly Recognized That Petitioners' Novel Categorical Rule Against Pleading-Stage Dismissals Would Be Unworkable and Unfair to Jeppesen

The Petition should be denied for the further reason that the Ninth Circuit was entirely correct in rejecting Petitioners' novel and unsupported request for a categorical bar against pleading-stage dismissals. Indeed, the court of appeals properly recognized that the circumstances of this case demonstrate the futility, impracticality, and unfairness of Petitioners' proposed rule. Pet. App. 61a-65a.

1. As an initial matter, Petitioners offer no persuasive explanation for why a court must go through the pointless exercise of allowing discovery to

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[2] Petitioners correctly note that the questions presented here are "distinct" from the questions presented in *General Dynamics Corp. v. United States*, No. 09-1298, and *Boeing Co. v. United States*, No. 09-1302. Pet. 34 n.9. Unlike this case, in which the privilege was invoked *defensively* to defeat a suit at the pleadings stage, the latter cases raise the question whether the Government may invoke the state secrets privilege *offensively* to prevail in its pursuit of substantial sums from contractors on the grounds of a termination for default. Moreover, because *General Dynamics* involves a wide-ranging suit that was extensively litigated for nearly 20 years, it does not remotely present the question whether invocation of the state secrets privilege can ever warrant dismissal at the pleadings stage. Because the questions presented in *General Dynamics* are thus completely distinct from those presented here, the Petition here should be denied rather than held for *General Dynamics*.

commence when it is obvious from the nature of the plaintiffs' factual allegations and the classified submissions the court has received that the case cannot be litigated any further without risking disclosure of the very information the state secrets privilege is designed to protect. In the "rare circumstances" where that determination can be made at the very outset of a case, no sound justification exists for a court to stay its hand. Pet. App. 63a. As the Fourth Circuit has observed, "[c]ourts are not required to play with fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for which the privilege exists." *Sterling*, 416 F.3d at 344.

2. Moreover, the nature of the factual allegations Petitioners seek to prove and a review of even the unclassified declaration submitted by the Government in this case demonstrate why the Ninth Circuit was plainly correct in concluding that Petitioners' proposed categorical bar on pleading-stage dismissals is inappropriate and would place Jeppesen in a wholly untenable and unfair position.

As noted above, Petitioners' complaint contains very little by way of allegations against Jeppesen itself. Rather, the allegations of the complaint fall into two main categories. First, the vast bulk of the complaint recounts the alleged mistreatment Petitioners claim to have suffered at the hands of agents of the CIA and various foreign governments, without any involvement of Jeppesen or its employees. *See supra* at 4. Second, the complaint contains a relatively small number of largely conclusory allegations relating to the flight-planning assistance Jeppesen allegedly provided to the CIA from its office in San Jose, California. *See supra* at 4-5. Neither of those catego-

ries of allegations could have been litigated on remand had this action been allowed to proceed.

a. As to the latter category—whether and to what extent Jeppesen provided flight-planning services to the flights in question—the Government's invocation of the state secrets privilege effectively would have precluded Jeppesen from presenting any evidence concerning whether Jeppesen did or did not assist the alleged flights. Indeed, contrary to Petitioners' assumption that the case could have been remanded for commencement of discovery, the case could not have proceeded at all because Jeppesen would have been unable even to file an *answer*.

The CIA Director expressly asserted the state secrets privilege over all "[i]nformation that may tend to confirm or deny whether Jeppesen or any other private entity assisted the CIA with any alleged clandestine intelligence activities." (ER 746.) In light of that indisputably valid assertion of the privilege, Jeppesen would have been placed in an inescapable bind. In order to respond to the complaint, Jeppesen would have had to "admit or deny the allegations asserted against it" by Petitioners. Fed. R. Civ. P. 8(b)(1)(B). Jeppesen would thus simultaneously have had to "admit or deny" Petitioners' allegations that Jeppesen assisted the CIA's rendition program, *without* "confirm[ing] or deny[ing] whether Jeppesen ... assisted the CIA with any alleged clandestine intelligence activities." (ER 746.) The task would have been impossible, as there is no way Jeppesen could have steered between these irreconcilable demands.

Petitioners argued below that Jeppesen could submit a draft of its answer to the United States, which could then assert the state secrets privilege over Jeppesen's responses to the allegations as to whether

or not Jeppesen provided the assistance alleged or did or did not have the knowledge that Petitioners alleged. *See* Plaintiffs' C.A. Reply Brief on Rehearing En Banc at 15-17. According to Petitioners, the invocation of the privilege would then override the provisions of Rule 8 that normally treat a failure to deny as an admission, and would then put Petitioners to their burden of proof. *Id.* at 16. Far from resolving the fundamental problem confronting Jeppesen, Petitioner's suggested procedure starkly underscores it. Petitioners' proposal tacitly concedes that, if this suit were to proceed, Jeppesen would be *completely* unable to say *anything* about the central issues in the case.

The Ninth Circuit properly rejected Petitioners' suggestion that a lawsuit may go forward as a one-sided sham in which the plaintiffs get to tell their side of the story and there is "precious little [the defendant] could say about its relevant conduct and knowledge" in light of the Government's invocation of the state secrets privilege. Pet. App. 63a.

b. The problem is, if anything, even starker with respect to Petitioners' underlying allegations of mistreatment at the hands of agents of the CIA and foreign governments. Under Petitioners' own theory of the case, Jeppesen had no direct involvement in the actual physical mistreatment of them, and therefore *all* competing evidence that might contradict Petitioners' version of the underlying events in question would presumably only be in the possession of the United States and the relevant foreign governments that allegedly were involved in that mistreatment. But given that the CIA Director also invoked the state secrets privilege with respect to "[i]nformation that may tend to confirm or deny any alleged cooperation between the CIA and foreign governments

regarding clandestine intelligence activities," and "[i]nformation concerning the scope and operation of the CIA terrorist detention and interrogation program" (ER 746), Jeppesen would be unable to obtain any information concerning the underlying torts that were allegedly committed by U.S. and foreign agents. As a consequence, Petitioners' version of events could not be subject to any meaningful adversarial testing, thereby giving Petitioners, for all practical purposes, a *carte blanche* to lie.

c. Accordingly, had this case been allowed to proceed beyond the pleading stage, the result would have been a process in which Jeppesen could neither respond to the allegations of Petitioners' complaint concerning its own conduct nor obtain any evidence about the underlying events from any source other than Petitioners themselves. The Ninth Circuit correctly recognized that, in these unusual circumstances, the claims raised by Petitioners could not have been litigated in a way that was workable or that fairly examined the factual issues.

The correctness of the Ninth Circuit's ruling is strongly confirmed by the Fourth Circuit's decision in *El-Masri*, which dismissed a similar suit against private airlines alleged to have participated in the CIA's extraordinary rendition program. As the Fourth Circuit recognized, there was simply no practical way in which the suit could be fairly litigated consistent with the Government's assertion of the state secrets privilege:

> [D]efendants could not properly defend themselves without using privileged evidence. The main avenues of defense available in this matter are to show that El-Masri was not subject to the treatment that he alleges; that, if he was

> subject to such treatment, the defendants were not involved in it; or that, if they were involved, the nature of their involvement does not give rise to liability. Any of those three showings would require disclosure of information regarding the means and methods by which the CIA gathers intelligence. If, for example, the truth is that El-Masri was detained by the CIA but his description of his treatment is inaccurate, that fact could be established only by disclosure of the actual circumstances of his detention, and its proof would require testimony by the personnel involved.

479 F.3d at 309.

The en banc Ninth Circuit likewise recognized that any effort to proceed with this litigation would be impracticable from a procedural standpoint, as well as profoundly unfair to Jeppesen. As the court aptly noted, because "*any* plausible effort by Jeppesen to defend against" Petitioners' claims "would create an unjustifiable risk of revealing state secrets," there is "precious little that Jeppesen could say" to defend itself. Pet. App. 61a-63a (emphasis in original).

III. This Case Would Be a Poor Vehicle for Revisiting the Scope and Application of the *Reynolds* Privilege

Even if Petitioners had identified any persuasive basis for revisiting the settled law as to when a case may be dismissed at the pleadings stage based on the state secrets privilege, this case would be a poor vehicle for doing so. In pursuit of their professed goal of challenging "the legality of executive actions," Pet. 38, Petitioners made the unusual choice of bringing a damages action against *only* a private corporation

and only under the Alien Tort Statute. As a consequence of that tactical litigation decision, this case is freighted with multiple collateral legal problems and is doomed to failure on several alternative grounds. To the extent that there were any reason to review the scope of the *Reynolds* privilege (and there is not), the Court should await a case in which the *Reynolds* issue makes a decisive difference to an *otherwise viable* suit. *Cf.* Eugene Gressman, *et al.*, SUPREME COURT PRACTICE § 4.4(f), at 248 (9th ed. 2007) (even in cases of clear conflict, certiorari may be denied if resolution of the "conflict is irrelevant to the ultimate outcome of the case before the Court").

1. As noted earlier, Petitioners concede that a case implicating state secrets may be dismissed at the pleadings stage when the complaint falls within the distinct "*Totten*" bar, which (at the very least) categorically prohibits suits "that depend upon clandestine spy relationships." *Tenet*, 544 U.S. at 10 (discussing *Totten v. United States*, 92 U.S. 105, and explicitly distinguishing this rule from the state secrets privilege). But as Jeppesen argued in the court of appeals, the *Totten* bar *does* apply here, thereby confirming that Petitioners' suit fails either way. Pet. App. 37a-39a, 52a-54a (rejecting Petitioners' narrow reading of *Totten*, but reserving decision on whether *Totten* barred the claims in this case).

a. *Totten* involved a suit for compensation brought by the estate of a Union spy who had allegedly entered into an agreement with President Lincoln to obtain military intelligence during the Civil War. 92 U.S. at 105-06. This Court upheld dismissal of the action based on the principle that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably

lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." *Id.* at 107. That principle barred the estate's claim because "[t]he service stipulated by the contract was a secret service," and "the existence of a contract of that kind is itself a fact not to be disclosed." *Id.* at 106-07.

This Court reaffirmed what it termed "the unique and categorical nature of the *Totten* bar" in *Tenet*, 544 U.S. at 7 n.4. In *Tenet*, alleged former Cold War spies brought suit against the Government and the director of the CIA, asserting "estoppel and due process claims for the CIA's alleged failure to provide respondents with the assistance it had promised in return for their espionage services." *Id.* at 3. The Ninth Circuit allowed the suit to proceed, holding that *Totten* barred only breach of contract claims, not the due process and estoppel claims asserted by the plaintiffs. *Id.* at 8. This Court, however, unanimously reversed. *Id.* at 7-11.

The *Tenet* Court made clear that *Totten* erects an independent, "categorical" bar to the pursuit of "the distinct class of cases that depend upon clandestine spy relationships" and that this "*Totten* bar" is separate and distinct from the state secrets privilege. *Tenet*, 544 U.S. at 9-10; *see also id.* at 10 (explicitly rejecting the "view that the *Totten* bar has been reduced to an example of the state secrets privilege"). Although the Court acknowledged that it had "looked to" *Totten* when defining the state secrets privilege in *Reynolds*, the Court clarified that its doing so "in no way signaled our retreat from *Totten*'s *broader* holding that lawsuits premised on alleged espionage agreements are altogether forbidden." *Id.* at 9 (emphasis added). Moreover, the Court rejected the

Tenet plaintiffs' argument that the *Totten* bar was limited to "breach-of-contract claims seeking to enforce the terms of espionage agreements." *Id.* at 8. As the Court explained, the *Totten* bar was grounded in the broader principle that "'[p]ublic policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential.'" *Id.* (quoting *Totten*, 92 U.S. at 107).

b. The en banc court correctly rejected Petitioners' suggestion that *Totten* is a "narrow doctrine pertaining to *enforceability* of espionage contracts by dissatisfied secret agents," Plaintiffs' C.A. Reply Brief on Rehearing En Banc at 9. *See* Pet. App. 37a-39a. As the court explained, the principles on which *Totten* and *Tenet* rest were not limited to the specific context of suits brought by alleged spies. The court noted that *Reynolds* had described *Totten* as more broadly prohibiting any case in which "'the very subject matter of the action' is 'a matter of state secret.'" *Id.* at 38a (quoting *Reynolds*, 345 U.S. at 11 n.26). Moreover, the court correctly concluded that any suggestion that *Totten* was limited to the plaintiff-spy context was refuted by this Court's decision in *Weinberger v. Catholic Action of Hawaii / Peace Educ. Project*, 454 U.S. 139 (1981), where this Court applied the *Totten* bar to justify dismissal of a case "having nothing to do with espionage contracts." Pet. App. 38a. *Weinberger* was a case brought by a public interest group challenging the Navy's failure to issue an environmental impact statement concerning the alleged transfer of nuclear weapons to a Hawaiian base. 454 U.S. at 142, 146. As this Court observed in

Tenet, *Weinberger* "credited the more sweeping holding in *Totten*, thus confirming its continued validity." 544 U.S. at 9.[3]

c. The applicability of the *Totten* bar to this case is apparent on the face of Petitioners' complaint.

As Judge Bea noted in his concurrence below, the *Totten* bar's applicability here is straightforward under the majority's (correct) holding that *Totten* extends beyond suits about espionage relationships and applies to all suits whose "very subject matter" implicates state secrets. Pet. App.73a-74a. *All* of Jeppesen's alleged liability ultimately depends upon whether or not "officials of the United States government arrested and detained Plaintiffs and subjected them to specific interrogation techniques," but the correctness of these latter allegations "are a matter of state secret." *Id.* at 74a. The "'very subject matter of the action'" is therefore a "'matter of state secret,'" bringing the suit squarely within the *Totten* bar. *Id.* at 73a.

But even if the *Totten* bar were viewed as more narrowly focused upon clandestine intelligence relationships, the rule's applicability is still apparent from the face of Plaintiffs' complaint. The central allegation upon which this action rests is that Jeppesen purportedly *"entered into an agreement with agents of the CIA* and U.S.-based corporations ... to provide flight and logistical support to the aircraft

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[3] Petitioners' *amicus* is thus flatly incorrect in asserting that "this Court has never applied the *Totten* bar outside the context of a clandestine contract." Br. of *Amicus Curiae* The Constitution Project 8.

and crew" used in the CIA's extraordinary rendition program. (ER 814 (emphasis added).) Moreover, Petitioners' complaint alleges that, pursuant to its asserted agreement and understanding with the CIA, Jeppesen supposedly undertook to use its position as an established flight services provider in order to "permit[] the CIA to conduct its illegal activities below the radar of public scrutiny" by, for example, filing "dummy" flight plans with foreign civil aviation authorities. (ER 767-68.)

Given these allegations, this suit is plainly "premised on [an] alleged espionage agreement[]," *Tenet*, 544 U.S. at 9, and is therefore categorically barred by the *Totten* rule. *See also id.* at 10 (*Totten* rule bars all suits that "depend upon [alleged] clandestine spy relationships"). Moreover, because Petitioners' complaint explicitly alleges, and seeks to establish, a purported secret agreement to provide services to intelligence officials, this case directly implicates *Totten*'s "core concern" that litigation that "depends upon [alleged] clandestine spy relationships" inextricably creates an "unacceptable" risk of such relationships being revealed. *Tenet*, 544 U.S. at 10-11; *Totten*, 92 U.S. at 107. Both the rationale behind *Totten*'s categorical bar and the rule's plain terms therefore apply with full force here.

The majority below acknowledged that *Totten* likely bars Petitioners' claims based on explicit allegations of an agreement between Jeppesen and the CIA to support clandestine intelligence activities. Pet. App. 52a-53a. The majority declined to decide, however, whether *Totten* also barred Petitioners' claims that were based on allegations that Jeppesen provided assistance with *reckless disregard* of the CIA's alleged unlawful intelligence activities. *Id.* at 31a-32a, 54a.

But the question reserved by the court of appeals is easily answered. Even assuming *arguendo* that a mere reckless disregard were otherwise a basis of liability under the Alien Tort Statute, *but see infra* at 32-33, this reduced scienter standard does nothing to evade the *Totten* bar. Petitioners' claims against Jeppesen irreducibly rest on the premise that Jeppesen allegedly supported the CIA's intelligence activities, with either actual or constructive knowledge that it was doing so. Nothing in *Tenet* suggests that the *Totten* bar applies only to formal espionage arrangements and does not extend to the more informal and tacit arrangements that Petitioners' alternative theory posits. The rationale of *Tenet* is that litigation that "depend[s] upon [alleged] clandestine spy relationships" inextricably creates an "unacceptable" risk of such relationships being revealed. *Tenet*, 544 U.S. at 10-11. That rationale is equally implicated whether the alleged relationship is embodied in a formal contract or instead assertedly exists only in a tacit form.

The applicability of the *Totten* bar here is confirmed by the Fourth Circuit's decision in *El-Masri*. There, as noted, the court of appeals confronted a factually analogous case against private airlines that allegedly assisted in extraordinary renditions. The court held that the suit would impermissibly require inquiry into "the existence and details of CIA espionage contracts, an endeavor practically indistinguishable from that categorically barred by *Totten* and *Tenet v. Doe*." *El-Masri*, 479 F.3d at 309.

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Because the *Totten* bar independently requires dismissal of this suit, Petitioners' suit would still fail even if Petitioners were correct that a case implicat-

ing state secrets should not be dismissed at the pleadings stage unless it falls within *Totten*.

2. The *Totten* bar is not the only additional threshold deficiency of Petitioners' suit. Contrary to the suggestion of Petitioners and their *amici* that the court of appeals' state-secrets-based dismissal deprived them of a "judicial remedy" that Petitioners otherwise would have had "for the unconscionable and unlawful treatment to which they were subjected," Pet. 29, the only judicial remedy Petitioners actually asserted here—a suit against Jeppesen under the Alien Tort Statute ("ATS")—does not exist. Although the viability of Petitioners' claims under the ATS was not raised or decided below, it is abundantly clear that Petitioners cannot meet the standards for ATS claims that were established by this Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

a. In *Sosa*, this Court held that the ATS was intended to confer jurisdiction for a "narrow set" of common law violations that were recognized at the time of its enactment in 1789, *id.* at 715, 720, and that the courts today continue to possess a "restrained" federal common law authority to "adapt[] the law of nations to private rights." *Id.* at 725, 728. *Sosa* emphasized, however, that courts must exercise "great caution" in employing a federal common law authority "with such obvious potential to affect foreign relations." *Id.* at 728, 731. In order to contain this authority within appropriate limits, the Court established a "requirement of clear definition" that is a necessary, but not sufficient, condition for recognizing a proposed international-law norm as privately enforceable under federal common law. *Id.* at 733 n.21. Application of this "clear definition" rule involves two separate considerations.

First, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted," 542 U.S. at 732—*i.e.*, the norm must be "'specific, universal, and obligatory,'" *id.*, and it must have "the certainty afforded by Blackstone's three common law offenses" against the law of nations "addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 737, 715.

Second, even if a plaintiff can show that a norm meets this strict definitional standard, the court still must decide whether it is appropriate to recognize a private right of action to enforce the norm, and if so, under what circumstances. As the *Sosa* Court put it, "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." 542 U.S. at 732-33 (footnote omitted). Because the "creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not," courts also must consider "the possible collateral consequences of making international rules privately actionable." *Id.* at 727.

b. For several reasons, it is manifestly clear that Petitioners' claims against Jeppesen—which rest exclusively on the ATS—cannot meet *Sosa*'s "demanding standard." 542 U.S. at 738 n.30.

First, *Sosa*'s standards do not permit a claim to be asserted under the ATS against a *corporation* for an

alleged violation of international law. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010) ("For now, and for the foreseeable future, the Alien Tort Statute does not provide subject matter jurisdiction over claims against corporations."); *Doe v. Nestle, S.A.*, ___ F. Supp. 2d ___, 2010 WL 3969615 at *74 (C.D. Cal. 2010) ("corporations may not be sued under the Alien Tort Statute"). *Sosa* requires, *inter alia*, that an ATS plaintiff show that "*international law* extends the scope of liability for a violation of a given norm *to the perpetrator being sued*." 542 U.S. at 732 n.20 (emphases added). International law, however, generally addresses only the conduct of *States* and, to a lesser extent, the conduct of natural persons (at least with respect to certain core human rights principles). *Kiobel*, 621 F.3d at 118-20. Because private corporations are generally not the subjects of international law at all, it is impossible to conclude that there is the sort of universal consensus on the point that *Sosa* requires. *Id.* at 148-49 (because "corporate liability has not attained a discern[i]ble, much less universal, acceptance among nations of the world," it cannot "form the basis of a suit under the ATS"); *Doe v. Nestle*, 2010 WL 3969615 at *75 ("the existing authorities fail to show that corporate liability is sufficiently well-defined and universal to satisfy *Sosa*").

The rule that corporations may not be sued under the ATS is also consistent with the principles applied in the most closely analogous federal-law contexts. *See Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66-74 (2001) (*Bivens* civil suit for constitutional violations is not available against a private corporation, but only against individual federal officers); *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126-28 (9th Cir. 2010) (express federal statutory cause of action

for torture committed under color of law of a foreign government applies only against individuals and does not extend to corporations). That federal law does not recognize corporate liability in the most closely analogous contexts provides powerful confirmation that such liability is not available to enforce international law under the ATS. *See Sosa*, 542 U.S. at 727-28 (federal-common-law authority under ATS should be exercised with "great caution" because the "decision to create a private right of action is one better left to legislative judgment in the great majority of cases") (citing *Malesko*); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 180 (1994) (in fashioning judicially-created private rights of action, courts should be guided by policy judgments Congress has made in analogous express causes of action; it would be "'anomalous'" for a judicially created cause of action to sweep "'beyond the bounds [Congress] delineated for comparable express causes of action'").

Second, Petitioners' allegations rest on the theory that Jeppesen can be held *secondarily* liable for international-law violations committed by others,[4] but Petitioners fail to meet the demanding standards that would be applicable to any such claim. There is

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[4] The en banc court assumed *arguendo* that Petitioners were correct in describing some of their theories of liability as resting upon *primary* rather than *secondary* liability. Pet. App. 31a-32a; *see also id.* at 52a-53a & n.7. But Petitioners cannot change a theory of secondary liability into a theory of direct liability simply by slapping a legal conclusion onto their complaint's recitation of the theory. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

substantial doubt whether secondary liability is *ever* available under the ATS,[5] but even those courts that have recognized such liability have held that the standards for establishing it are strict.

For example, in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), the Second Circuit held that "there is a sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law," but that "no such consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law." *Id.* at 259 (emphases in original). Thus, it is not enough to show that a defendant provided assistance to the government in question with knowledge that the government might engage in violations of international law; rather, it must be pleaded and proved that the defendant "acted with the purpose to assist the Government's violations of customary international law." *Id.* at 263; *see also id.* at 247 ("a claimant must show that the defendant provided substantial assistance with the *purpose of facilitating the alleged offenses*") (emphasis added). The Second Circuit also held that, to the extent that conspiracy claims were cognizable

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[5] *See, e.g., Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (civil aiding-and-abetting liability is not available under the ATS), *appeal pending*, No. 09-7125 (D.C. Cir.); *see generally* Curtis A. Bradley, *et. al*, "*Sosa*, Customary International Law, and the Continuing Relevance of *Erie*," 120 HARV. L. REV. 869, 925-29 (2007) (concluding that civil aiding-and-abetting liability is not consistent with *Sosa*).

under international law at all, they would be subject to the same strict scienter standards. *Id.* at 260.

Plaintiffs' paltry allegations fall far short of these standards. Plaintiffs' entire complaint rests on the allegation that, from its San Jose offices, Jeppesen remotely supplied flight-planning services to overseas flights operated by the CIA, and that Jeppesen allegedly did so with either *knowledge* or *reckless disregard* of what the CIA might being doing on those flights. *See supra* at 4-6. As a matter of law, that is not enough to meet *Sosa*'s demanding standards. *See Presbyterian Church*, 582 F.3d at 259. Moreover, as the en banc court noted, even the complaint's meager allegations of knowledge rested on "media reports cited as putting Jeppesen on notice," but the "vast majority" of those reports "were published *after* Jeppesen's services were alleged to have occurred." Pet. App. 59a-60a n.11. These flimsy allegations are plainly insufficient to "'nudge[]'" Petitioners' claims against Jeppesen "'across the line from conceivable to plausible.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009). Indeed, if aiding-and-abetting liability could be established by these scanty and conclusory allegations of scienter, then such liability could just as easily (and just as wrongly) be pleaded against *any* company that provided any sort of commercial services that might have been used by the United States or a foreign government in the commission of an alleged international-law violation.

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In sum, the fact that the questions presented by the Petition are raised in the context of a far-fetched lawsuit plagued by multiple additional legal flaws makes this case a poor vehicle for undertaking any novel reassessment of the *Reynolds* privilege.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL P. COLLINS
Counsel of Record
PAUL J. WATFORD
MUNGER, TOLLES & OLSON LLP
355 South Grand Ave., 35th Fl.
Los Angeles, CA 90071
(213) 683-9100
DANIEL.COLLINS@MTO.COM
Counsel for Respondent
Jeppesen DataPlan, Inc.

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